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No. 03-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

WILLIAM P. SCHLENK,

Petitioner,

v.

FORD MOTOR CREDIT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit departed from this Court's clear precedents by failing to accord any deference to the Federal Reserve Board's controlling interpretation of its own administrative rules implementing the Truth in Lending Act?

2. Whether the Sixth Circuit misinterpreted and misapplied the provisions of the Truth in Lending Act, by holding that the statute and its governing administrative rules do not prohibit respondent from stating on every automobile lease that it does not charge an acquisition fee, when in fact respondent has been charging millions of consumers one of the highest acquisition fees in the marketplace, costing them hundreds of dollars per lease?

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REPLY BRIEF FOR PETITIONER

The gist of petitioner's case is that Ford uses a pre-printed lease form for hundreds of thousands of motor vehicle leases, and on this form, Ford expressly lists the acquisition fee within those charges that should be itemized as part of the gross capitalized cost. Nonetheless, Ford fills in "N/A" in that spot on the leasing forms as a regular practice, thereby wrongly indicating that it charges no such fee as part of its leasing terms, when in fact it charges one of the most exorbitant fees in the entire marketplace. *See* Complaint ¶¶ 22-24. As a result, prospective lessees have no way to know or ascertain the fact that Ford actually does impose an acquisition fee as part of the cost of the lease. Further, they cannot determine the amount of the acquisition fee that would be imposed if they executed such a lease with Ford. *See* Pet. 6-9. That conduct plainly violates the Truth in Lending Act.

Against that general background, this petition should be held pending the Court's disposition of *Household Credit Serv., Inc. v. Pfennig*, U.S. No. 02-857 (cert. granted June 27, 2003), which presents virtually identical issues of statutory and regulatory construction under the TILA.[1] In the alternative, the Court should call for the views of the Solicitor General on the issues raised in this case, just as it did in *Pfennig*. Although respondent here – like the respondent in *Pfennig* – seeks to downplay the key question of appropriate judicial deference to agency regulatory authority, that question must be answered in order to decide this case properly. The lower court erred here by failing to defer to the Federal Reserve Board's expert interpretation of its own regulation adopted to implement the TILA; accordingly, its ruling must ultimately be reversed and the case remanded for further proceedings.

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[1] With the consent of the parties pursuant to the Court's Rule 37.3, petitioner in this case has filed a brief on the merits as *amicus curiae* supporting petitioners in the *Pfennig* case. *See* Brief for William P. Schlenk, Petitioner in U.S. Case No. 03-112, as *Amicus Curiae* Supporting Petitioners, *Household Credit Serv., Inc. v. Pfennig*, No. 02-857 (Aug. 2003).

Before turning to the legal arguments, we first note that respondent seeks to depreciate the importance of the issues here by asserting that "the practices in issue in this case involve only a single company." Opp. 7. This claim is simply not correct. Any determination of the legality of respondent's leasing practices here will establish a rule governing *all* consumer leases (not only automotive leases), to which all companies engaged in such leases will adapt their future practices. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (involving only the fraudulent consumer practices of a single company, but settling constitutional issues pertaining to punitive damage awards); *United States v. Mead Corp.*, 533 U.S. 218 (2000) (involving only the importation practices of a single company, but settling important issues of administrative law). Finally, even if this point had any merit – which it does not – respondent does not deny that Ford's leases alone exceeded ***$11 billion*** in value to consumers in 2001. *See* Pet. 11. In sum, the direct importance to consumers of the issues presented in this case cannot be so casually minimized.

I. THE PETITION SHOULD BE HELD PENDING THE DISPOSITION IN *HOUSEHOLD CREDIT SERVS., INC. v. PFENNIG*, U.S. NO. 02-857.

On June 27, 2003, the Court granted *certiorari* in the *Pfennig* case, in which the question presented is whether the Sixth Circuit improperly substituted its interpretation of the TILA for that of the Federal Reserve Board, thereby effectively invalidating a regulation that affects tens of millions of consumer credit card arrangements. *See id.* Here, likewise, the issue is whether the same court improperly substituted its interpretation of the TILA for that of the Federal Reserve Board, thereby effectively gutting the TILA's provisions governing consumer leases and sharply undermining the effects of a regulation that affects billions of dollars of automobiles leased to consumers each year.

Respondent's perfunctory attempt to distinguish this case from *Pfennig* consists entirely of the following statement: "But unlike *Pfennig*, here the Sixth Circuit was never called upon to

exercise *Chevron* deference because there was no regulation interpreting the statute consistently with Schlenk's various arguments." Opp. 8.

This terse claim is both false and misleading. It is false because petitioner squarely presented the court below with the Federal Reserve Board's discussion of the term "gross capitalized cost," which was defined as *including* "lease acquisition charges" in its explanation of the terms and scope of Regulation M. Appellant's Opening Brief, Case No. 01-5434, at 12-14 (6th Cir. July 30, 2001). The regulatory materials that petitioner cited below are precisely the same excerpts from the Federal Register that petitioner relies on here. *See id.* at 12-13 (discussing import of Board staff's description of "gross capitalized cost" set out at 61 Fed. Reg. 52,274 (Oct. 7, 1996)); *see also* Pet. 8-9, 12-13, 14, 18-19 (discussing same excerpts from Board's discussion of Regulation M). The argument made to the Sixth Circuit, both in writing and orally, was the same argument petitioner continues to press here: that the Court should adopt the Board staff's explanation of Regulation M and thus should define the "gross capitalized cost" to include the "acquisition fee." *See* Pet. 11-19.[2]

Respondent's argument is also misleading insofar as it asserts that judicial deference to agency action is not at issue here because "no regulation" explicitly supports Schlenk's position. Opp. 8. While it is true that in *Chevron U.S.A., Inc. v. Natural Resources Defense Ccl., Inc.*, 467 U.S. 837 (1984), the Court held that it would defer to an agency regulation interpreting the agency's governing statute, many other cases in the *Chevron* line do not turn on the existence of a formal *regulation*. Rather, these cases rely on other agency materials that illuminate the agency's expert views on the proper interpretation of its own regulations or the terms of its governing statute. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 590-91 (2000) (Scalia, J., concurring) ("Quite appropriately, therefore, we have accorded *Chevron* deference

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[2] In this connection, it is revealing that respondent never actually claims that petitioner waived any of his arguments below.

not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats.") (citing cases). *Mead* is such a case, and it explicitly holds that courts should defer to reliable indices of agency expertise even if they are not embodied in a regulation promulgated through the notice-and-comment rulemaking process. *See* 533 U.S. at 227-39. Even more to the point, in *Ford Motor Co. v. Milhollin*, 444 U.S. 555 (1980), the Court expressly held that "unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons." *Id.* at 565. Petitioner relies here on the Board staff and its explicit construction of the effect of the TILA and Regulation M on the types of consumer leasing transactions at issue in this case; thus the proper application of *Milhollin* is directly at issue here, just as it is in *Pfennig*.

Another related, evasive tactic that respondent employs is to note that the "snippet" of expert Board interpretation stating that acquisition fees are to be included within the "gross capitalized cost" was never published in the Code of Federal Regulations. *See* Opp. 5, 9. That is correct but irrelevant; the discussion in question was published instead in the Federal Register, and that difference in the published sources is immaterial to either the holding or the rationale of the Court's precedents granting deference to agency interpretations. *See, e.g.*, *Young v. Community Nutrition Inst.*, 476 U.S. 974, 978-79 (1986) (Court granted deference to FDA's "longstanding interpretation of the statute," as reflected in a no-action notice published in the Federal Register).

In all pertinent respects, this case and the *Pfennig* case are governed by the same principles of statutory and regulatory construction. Here, just as in *Pfennig*, the Sixth Circuit's failure to defer to the Board's expert views on the proper reading of its governing statute and implementing regulations is error that warrants reversal. *See* Brief for William P. Schlenk, Petitioner in U.S. Case No. 03-112, as *Amicus Curiae* Supporting Petitioners, *Household Credit Serv., Inc. v. Pfennig*, No. 02-857, at 4-14 (Aug. 2003).

II. THE SIXTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S INTERPRETATION OF ITS OWN REGULATION CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS.

Surprisingly, respondent never addresses the disharmony between the ruling below and this Court's precedents deferring to the Board and its staff in cases such as *Milhollin*, *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981), and *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356 (1973). Nor does respondent undertake any effort to discuss or distinguish the conflicting circuit decisions in which other courts uniformly defer to the Board and its staff in similar circumstances.[3]

Instead, respondent simply reargues the merits of the ruling below, contending that it was correctly decided. *See* Opp. 8-13. Yet in presenting only one side of the merits of the case, those arguments do not offer persuasive reasons against a grant of *certiorari*, particularly where the court below applied the wrong methodology in failing to give the proper deference to the expert views of the Federal Reserve Board and its staff.

In any event, respondent's arguments are insubstantial even on their own terms. Its principal argument is that neither the TILA nor Regulation M clearly requires lessors to disclose the acquisition fee as part of the gross capitalized cost. *See* Opp. 9-10. But this is just the beginning, rather than the end, of the inquiry under cases such as *Chevron*, *Mead*, and *Milhollin*. Respondent does not and cannot claim that either the statute or the regulation *settles* the issue *in its favor – i.e.*, neither the statute nor the regulation clearly authorizes lessors to refuse to disclose the acquisition fee as part of the gross capitalized cost. It is precisely the ambiguity of the governing statutes and rules on the issues raised in this case that requires

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[3] Indeed, respondent cites only one other lower court case in its brief in opposition. The case – *Mitchell v. Ford Motor Credit Co.*, 68 F. Supp. 2d 1315 (N.D. Ga. 1998) – is completely inapposite, as it involved only tort and contract claims brought under the common law of Georgia.

the courts to examine further the interpretive materials that the Board and its staff have adopted to facilitate the proper application of the TILA and Regulation M to consumer leases.

The crucial insight is found here in the passage petitioner has highlighted from the Board's discussion of Regulation M, which was published in the Federal Register at the time the rule was adopted. *See* 61 Fed. Reg. 52,246, 52,274 (Oct. 7, 1996). In that passage, the Board staff stated plainly that "[g]ross capitalized cost is analogous to gross purchase price including lease acquisition charges." *Id.* This is the one definitive statement pertaining to the issue presented here, and it indicates that acquisition fees are to be included in the lease figure for gross capitalized cost. Against that passage from the Board and its staff's own expert commentary on the new rule, respondent offers precisely *nothing* to offset it, save the subjective assessment that this would represent a "striking new substantive requirement for leases." Opp. 5-6. That assessment is debatable, but in any event there is no inconsistency between it and the acknowledged purposes of the 1996 amendments to Regulation M, which were designed to "ensure that lessees or personal property receive meaningful disclosures that enable them to compare lease terms with other leases," 12 C.F.R. § 213.1(b)(1), and to "provide for the accurate disclosure of lease terms in advertising," *id.* § (b)(3). Indeed, it would have been most peculiar if the Board had managed to accomplish these objectives by overhauling Regulation M, as it did in 1996, *without* imposing any "new substantive requirement[s] for leases." Opp. 5-6.

Respondent also makes an ingenious argument that its approach is truly beneficial to consumers: by failing to disclose the acquisition fee in the "gross capitalized cost," and locating it instead within the "rent charge," the lessee saves money in those instances where he either terminates early or defaults on the lease. *See* Opp. 11-12. But that view completely begs the question of where the overall benefit lies. If the lessor would be unable to charge such an exorbitant acquisition fee (Ford's is one of the highest on the market, *see* Pet. 11-12) were it to disclose rather than deny that it levies such a fee in a

competitive marketplace, then the open question is whether respondent benefits more by collecting that fee from the vast majority of its lessees while forgoing part of that fee for the subset of lessees who terminate early or default. At a minimum, it is unlikely that respondent's misrepresentations about the acquisition fee on the face of its standard lease have either the purpose or the effect of being magnanimous concessions to consumers.

Finally, respondent suggests that the passages petitioner relies on from the Board staff's interpretation of Regulation M actually derive from the "Regulatory Flexibility Analysis" prepared by the Board's staff, rather than from an "Official Staff Commentary" prepared by the Board's staff. *See* Opp. 5. In the text of the Federal Register, various staff interpretations and explanations of Regulation M are bundled together for publication. *See* 61 Fed. Reg. 52,246 *et seq.* (Oct. 7, 1996). On page 52,269 the following headings appear in close succession: "Appendix C to Part 213–Issuance of Staff Interpretations"; "Supplement I to Part 213–Official Staff Commentary to Regulation M"; and "Appendix I to the Preamble–Regulatory Flexibility Analysis."

Importantly, however, all of these explanations of Regulation M advanced by the Federal Reserve Board and its staff are formally incorporated into the official commentary on the provisions of the new rule. Indeed, the introduction to the "Regulatory Flexibility Analysis" itself makes clear that this document is prepared by Board staff pursuant to express statutory authority. *See* 61 Fed. Reg. at 52,257. Thus, it readily fits the *Milhollin* formula for justifying judicial deference, "that considerable respect is due the interpretation given a statute by the officers or agency charged with its administration." 444 U.S. at 566 (quotation omitted). Indeed, respondent never argues otherwise. The details of this explanation of the consequences of Regulation M by the Board's staff thus confirms the Court's holding in *Milhollin* that "it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda." *Id.* at 566 n.9.

III. THE TRUTH IN LENDING ACT BARS LESSORS FROM FALSELY REPRESENTING THAT THEY CHARGE LESSEES NO ACQUISITION FEE.

It bears emphasis, as the Court has held, that the TILA was adopted as a "remedial measure" for the benefit of consumers, and thus should be liberally construed to that end. *Mourning*, 411 U.S. at 371. Other lower courts have construed the statute in this manner, *see* Pet. 20-21 (citing cases), but the Sixth Circuit here did not. The court below doubly erred, therefore, when it misread TILA and ignored the Federal Reserve Board staff's interpretation of the Board's own controlling Regulation M.

Respondent closes by citing part of the same passage that petitioner relies on, noting that the "goal of a disclosure scheme should be to make available sufficient information that consumers can make good decisions." Opp. 13 (quoting 61 Fed. Reg. at 52,273). But respondent never explains how this goal is served by listing an "acquisition fee" on the face of every lease, disclaiming that any such fee is being charged by filling in the amount with "N/A," and then imposing such a fee at an exorbitant level by folding it into the "rent charge," where it is hidden from consumers and never disclosed. This practice simply cannot be squared with the Truth in Lending Act.

In addition, if the Court were to decide not to grant the petition outright, or to hold it for *Pfennig*, the magnitude of the consumer leases involved and the importance of the Board's ability to administer this complex statutory and regulatory scheme would justify the Court in calling for the views of the Solicitor General here, just as it did in the *Pfennig* case.

CONCLUSION

The petition for a writ of *certiorari* should be granted. In the alternative, the petition should be held pending the Court's resolution of virtually identical statutory and regulatory issues in *Household Credit Serv., Inc. v. Pfennig*, U.S. No. 02-857 (cert. granted June 27, 2003), or, at a minimum, the Court should call for the views of the Solicitor General, as it did in the *Pfennig* case.

Respectfully submitted,

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